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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-634

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT LEE NOBLES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

In our main brief we have discussed most of the arguments put forth by respondent in his brief. We have demonstrated the inapplicability of the Jencks Act (18 U.S.C. 3500) and of Rule 16, Fed. R. Crim. P., to the situation presented by this case; the support for our position found in common law principles and in the new Federal Rules of Evidence; and the fact that the privilege against compulsory self-incrimination does not protect the defense investigator's report from production here—because it was not personal to respondent or testimonial in character, because its production was not compelled, and because respondent would have waived whatever privilege he

may have had when he offered the investigator as a witness at trial.

We will not burden the Court by reiterating arguments already presented or by responding to contentions made by respondent in these contexts. However, we do think it appropriate to address respondent's Sixth Amendment claim based on the "shield of confidentiality" that is said to be part of the right to counsel, the work product contention, and the preclusion sanction as it relates to the Sixth Amendment rights of confrontation and compulsory process.[1]

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[1] Respondent also argues, as separate grounds for affirmance, the asserted abuse of discretion by the trial judge in refusing to permit testimony from a purported expert on the problems of eyewitness identification, and the alleged misconduct of the prosecutor. These issues, we submit, are not properly presented to this Court. If resolved in respondent's favor, they would entitle him to relief different from that which he was afforded by the court of appeals, since the retrial would thereby be governed by different rules. Since petitioner filed no cross-petition for a writ of certiorari, he may not now seek an affirmance of the judgment under review on these separate grounds. See *Strunk* v. *United States*, 412 U.S. 434, 437; *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512, 516; *National Labor Relations Board* v. *International Van Lines*, 409 U.S. 48, 52, n. 4; Stern, *When to Cross-Appeal or Cross Petition—Certainty or Confusion?*, 87 Harv. L. Rev. 763 (1974).

Moreover, the trial court properly rejected the proffer of the testimony of a purported expert on the problems of eyewitness identification, concluding that such testimony would invade the province of the jury and that the offer of proof in this case was inadequate; the court of appeals found no error in this ruling (Pet. App. 6a). To the extent that the trial court's conclusion was based on the offer of proof in this particular case, it does not warrant this Court's attention. To the extent that it reflects a legal conclusion that eyewitness identification is not a proper subject for expert testimony, it is a matter that, so far as our research discloses, has been considered by only one federal court

court's order

1. Respondent argues that the trial improperly pierced the 'shield of confidentiality" that is said to be a 'part of the Sixth Amendment right to counsel," therby jeopardizing the ability of defense counsel to represent respondent. While we do not doubt that a criminal defendant is entitled to the effective assistance of counsel, the aid of investigators in his preparation for trial when necessary (see 18 U.S.C.

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of appeals, the Ninth Circuit, in the instant case and in *United States* v. *Amaral*, 488 F. 2d 1148 (C.A. 9). It would be appropriate, we suggest, to allow other district courts and courts of appeals to consider the issue before this Court decides whether it should undertake to resolve it.

As for the issue of alleged prosecutorial misconduct, we submit that it too does not merit the attention of this Court in this case, particularly because it is a factual issue requiring detailed analysis of the record (see Stern, *supra*, 87 Harv. L. Rev. at 778–779)—an analysis, incidentally, in which the court of appeals already has engaged, leading it to conclude "that the trial judge conducted the case most properly, and the defendants received a fair trial" (Pet. App. 18a). It would be appropriate in these circumstances for this Court to exercise its discretion to decline respondent's invitation to consider this matter. The only question regarding purported prosecutorial misconduct that might arguably be relevant to the issue before the Court is the reference in the prosecutor's closing argument to the fact that the defense investigator never testified about what the witness Hoffman had said to him (App. 41). However, respondent's counsel never objected to this particular argument, nor did he request any corrective instruction in regard to it, despite abundant opportunity to do so (see Tr. 657–659, 750–754). Moreover, the court instructed the jury in its general charge that statements of counsel are not to be considered as evidence in the case (Tr. 757). In these circumstances—where a determination of plain error must be made on the entire record—we submit the alleged error is not appropriate for consideration by this Court. See *Lawn* v. *United States*, 355 U.S. 339, 359–360, n. 15.

3006A(e)), and the right to prepare his case without the intrusion of the government, these principles hardly support the proposition that the Sixth Amendment encompasses a "shield of confidentiality" that protects a defense investigator's report from disclosure to the government *after* the defendant offers the investigator as a witness at trial. The cases cited by respondent deal with evils far different from that which respondent says is involved in this case and are thus wholly inapposite.

In *Coplon* v. *United States,* 191 F.2d 749 (C.A.D.C.), the defendant alleged that government agents deliberately intercepted telephone conversations between the defendant and her lawyer, thereby interfering with her right to consult privately with counsel. In *Caldwell* v. *United States,* 205 F.2d 879 (C.A.D.C.), the government hired an informant to find out who was behind the defendant's alleged offenses; the informant became acquainted with defendant and his counsel and soon was asked to work on a number of matters arising in the preparation of the case. "In his dual capacity as defense assistant and Government agent * * * [he] gained free access to the planning of the defense" (205 F.2d at 880), and he reported to the government information regarding matters connected with the impending trial. Quoting from *Coplon,* the court held that "[t]he prosecution is not entitled to have a representative present to hear the conversations of accused and counsel" (*id.* at 881).

This Court termed the conduct in both *Coplon* and *Caldwell* "government intrusion of the grossest kind upon the confidential relationship between the defend-

ant and his counsel." *Hoffa* v. *United States*, 385 U.S. 293, 306. Nevertheless, it declined in *Hoffa* to apply the principles of those cases to reverse convictions for endeavoring to bribe members of a jury at a previous trial, despite the fact that during the previous trial a government informer had been present in and around the hotel suite where petitioner Hoffa had conferred with his lawyers. The testimony of the informant at the second trial could not be viewed, said this Court, as a "fruit" of the Sixth Amendment violation at the first trial, if any.

In this case, we submit, there is neither "fruit" nor "tree." An order of a court to disclose carefully limited portions of an investigator's report after the defense has chosen to call the investigator as a witness at trial is a far cry from the kind of surreptitious intrusion by the prosecution or police into the confidential relationship between a defendant and his lawyer that was found to be a Sixth Amendment violation in *Coplon* and *Caldwell* and assumed to be one in *Hoffa*.[2]

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[2] Nor is *In re Terkeltoub*, 256 F. Supp. 683 (S.D. N.Y.), relevant. That case turned largely on its own facts. It involved the compelled testimony of an attorney before a grand jury, during the defense preparation for a perjury trial, when the very subject of the grand jury inquiry was to be the attorney's investigation and preparation for trial. In those circumstances, the court found "no showing of the kind of vital, urgent, and immediate need for unique knowledge that might warrant the extraordinary compulsion the Government seeks" (256 F. Supp. at 686). Here, on the other hand, there was no compulsion, and the need for the knowledge was "vital, urgent, and immediate," for the investigator had been voluntarily offered by the defense as a witness at trial, and his report was to be produced only after the completion of the government's case-in-chief and after the direct examination of the investigator.

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Respondent further argues that orders such as that entered by the trial court in this case will jeopardize the ability of defense counsel to represent their clients effectively. It is suggested that such orders will impair the relationship of trust between defendants and their lawyers, inhibit investigators from gathering all the facts (both favorable and unfavorable), and encourage investigators to stop writing reports or to censor or tailor them. Of course, these dire consequences envisioned by respondent could arise only to the extent that the defense plans to offer testimony on a particular subject that is being investigated by its witness, and only to the extent that the witness's contemporaneous report of the investigation varies materially from the testimony the defense expects him to give at trial.

By ignoring the limited scope of the disclosure order in this case and the ability of the defense to withhold the report by not proffering testimony on the subject, respondent distorts the issue here. Nothing in the result we seek in the instant case would impinge upon the right of a defendant to withhold damaging information or create any obligation on him similar to that imposed on the government by *Brady;* only his power to *present* information in a false, misleading, or incomplete manner is involved.

We fail to see how the carefully circumscribed ruling of the district court in this case could have any effect on defense strategy beyond inhibiting the presentation of testimony that the defense knows or should know is either untruthful or of impaired reliability. Respondent's suggestion that the effect of the

ruling would be to generate deliberately falsified or incomplete reports in order to enable more freewheeling testimony at trial better suited to the convenience of defense strategy merely highlights and reinforces, in our view, the urgency of the need to permit disclosure of these reports in order to make possible meaningful and effective cross-examination and to aid the jury in its fact-finding mission.[3]

In sum, what is at stake here is the "right" of the defense to present distorted or incomplete evidence and to insulate its witnesses from effective cross-examination. We doubt that this properly can be considered a core value of the Sixth Amendment's right to counsel.[4]

2. Respondent next contends that the defense investigator's report constituted attorney's work product and was therefore privileged. We submit, on the contrary, that the work product rule has no application to the present situation.

The work product rule was recognized by this Court in the landmark case of *Hickman* v. *Taylor,* 329 U.S.

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[3] Moreover, the fact that defendants and their attorneys have maintained frank, trusting and often successful relationships despite such innovations as the reciprocal discovery provisions of Rule 16 and the alibi notice and insanity notice rules substantially undermines respondent's argument.

[4] To the extent that respondent's Sixth Amendment argument is premised on the statement in *Simmons* v. *United States*, 390 U.S. 377, 394, that it is "intolerable that one constitutional right should have to be surrendered in order to assert another" the validity of that notion in the context of the Sixth Amendment is not at all clear. See *United States* v. *Kahan*, 415 U.S. 239, 243; cf. *McGautha* v. *California*, 402 U.S. 183, 210–213. Nor, as we have indicated, is there anything in this case remotely like the kind of tension between constitutional rights that there was in *Simmons*.

495, and it is now codified for civil cases in Rule 26(b)(3) of the Federal Rules of Civil Procedure. One of its basic purposes is to prevent the unseemly practice of an attorney being forced to become a witness at trial to testify about matters in his files that previously have been disclosed to his adversary. Thus, the work product rule provides a qualified and limited protection before trial for trial preparation materials in the attorney's file that reflect his mental impressions, personal beliefs, trial strategy, legal opinions and conclusions, and the like. It thereby protects the privacy of the attorney during his preparation for litigation and prevents lawyers from obtaining the benefit of their opponents' diligence to aid their own preparation. See *Hickman* v. *Taylor, supra*, 329 U.S. at 508–514; *id.* at 514–519 (Jackson, J., concurring); McCormick, *Evidence* § 96, p. 207 (2d ed. 1972); 8 Wright and Miller, *Federal Practice and Procedure* § 2025, p. 212 (1970); Comment, *The Work Product Doctrine in the State Courts*, 62 Mich. L. Rev. 1199, 1200–1202 (1964).

One might question whether these principles apply at all when the potential witness is a defense investigator rather than an attorney.[5] Regardless of how one would resolve that issue, however, there can be no doubt that the protection arguably provided by the work product rule is terminated when, as here, a party

[5] The 1970 Amendments to Rule 26(b)(3), Fed. R. Civ. P., extended the protection of the work product doctrine to a "party's representative," but the Advisory Committee's Notes point out that the courts previously had been split on whether the *Hickman* work product doctrine applied only to attorneys. See 28 U.S.C. App., pp. 7778–7779.

offers a witness at trial and examines him about matters that the work product rule may theretofore have protected from disclosure. See Annot., *Development, Since Hickman* v. *Taylor, of Attorney's "Work Product" Doctrine,* 35 A.L.R. 3d 412, 484 (1971). Once trial has begun and the party claiming the protection of the rule calls such a witness to the stand, the principles of *Hickman* can no longer be invoked.

In the case at bar, the investigator already had memorialized his interviews in writing and turned his written report over to respondent's counsel. Respondent already had produced the investigator to testify about his recollection regarding the witnesses' remarks. At that point, the written report regarding the investigator's interviews—which itself constituted a written statement of the investigator—would have been most useful to attempt to impeach the investigator, who himself was called for the purpose of impeaching government witnesses. See Note, *Developments in the Law—Discovery,* 74 Harv. L. Rev. 940, 1037 (1961); Freund, *Work Product,* [illegible] F.R.D. 493, 496–497 (1968).[6] Having called the investigator as a witness, the defense signified an intention to reveal a portion of its "work product" relating to the investigator's interviews with government witnesses. It is

[6] Indeed, were the tables turned, the trial court undoubtedly would have considered the report of the investigator as "a written statement made by said witness [the investigator]" (18 U.S.C. 3500(e)(1)) and would have ordered the relevant portions of the "statement" produced under the Jencks Act. See 18 U.S.C. 3500(b).

axiomatic that it is not free to withhold the relevant remainder. See McCormick, *Evidence*, *supra*, at § 93.[7]

3. Respondent argues that the trial court deprived him of his Sixth Amendment rights to compulsory process and cross-examination of witnesses by precluding him from presenting the testimony of the defense investigator because he refused to produce relevant portions of the investigator's report. He suggests that the court should have applied alternative, less severe sanctions in lieu of preclusion and that preclusion is never an appropriate sanction against one who acts in good faith.

One reason this Court should reject this contention is that respondent failed to raise it in the trial court in any meaningful way by suggesting a viable alternative to preclusion. While he did suggest that the trial judge should permit the witness to testify and then strike the testimony, the judge properly concluded that there is no real distinction between not allowing the witness to testify at all and later striking the testimony; indeed, he noted: "[I]t would appear to me to be much more prejudicial to your client to have to strike this testimony than to have it not introduced"

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[7] Respondent relies upon the Eighth Circuit's opinion in *In re Grand Jury Proceedings*, *Duffy*, 473 F. 2d 840. Regardless whether the *Duffy* case was rightly decided, it is not applicable here. For *Duffy* held only that, prior to trial in a case, an attorney could not be compelled to testify before a grand jury with respect to his personal recollections or the contents of summaries he made and conclusions he drew with respect to interviews he had conducted in the course of preparation for anticipated litigation. Here, respondent voluntary offered the investigator as a witness to testify about those very matters.

(App. 35). The prejudice that would flow from the alternatives proposed by respondent for the first time in this Court—permitting the investigator to testify with an instruction from the court that he had refused to disclose the relevant portions of his report and that this refusal could be considered in assessing credibility, or allowing a comment by the prosecutor on the defense refusal to obey a court order—are, we suggest, even more prejudicial. One can readily surmise that defense counsel perceived that when he failed to suggest them to the trial court. In any event, the failure to suggest alternatives to the court that had the opportunity immediately to implement them should bar respondent from now attacking the decision of that court to fashion its own remedy—preclusion—for a deliberate decision not to comply with a court order.

On the merits of respondent's argument, we submit that this Court's decision in *Washington* v. *Texas*, 388 U.S. 14, upon which respondent relies, does not support his contention that the preclusion sanction employed here violated his Sixth Amendment right to compulsory process. That case involved a state statute that made the testimony of an accomplice "inadmissible whether he was present in the courtroom or not" (388 U.S. at 19). The Court found that such an "arbitrary rule," preventing "whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief" violated the compulsory process clause (*id.* at 22). The order of the trial court here is not of that variety; for it did not preclude the testimony of all defense investigators

but merely required respondent to comport with certain reasonable procedures as a prerequisite to the admission of the testimony of a particular investigator whom he chose to call as a witness. While *Washington* v. *Texas* obviously means that there is more to the compulsory process clause than the right to secure the attendance of witnesses in court, it does not mean that there can never be justification, in the particular circumstances of an individual case, for preventing a party from placing a particular witness on the stand or from conditioning his testimony on compliance with certain reasonable procedural requirements.[8]

It is significant that Rule 16(g) of the Federal Rules of Criminal Procedure, Rule 612 of the Federal Rules of Evidence, proposed Rule 12.1 of the Federal Rules of Criminal Procedure (the alibi notice rule), and the alibi notice rules of many States provide for the exclusion of testimony of witnesses for either side as a sanction that may be imposed in the discretion of the trial court. Indeed, as the Advisory Committee on the Federal Rules has noted in a similar context: "[I]t is generally assumed that the sanction is essential if the notice-of-alibi rule is to have practical significance." Advisory Committee Note to Proposed Rule 12.1, Fed. R. Crim. P., 62 F.R.D. 294. And while the Federal Rules of Evidence, in making clear that the sanc-

[8] Nor does *Brooks* v. *Tennessee*, 406 U.S. 605, support respondent's argument. The opinion in that case was not based upon the compulsory process clause, nor did it in any way limit impeachment and cross-examination of a witness (406 U.S. at 609) or curtail the ordinary power of the trial judge to conduct the trial (406 U.S. at 613).

tions of the Jencks Act continue to apply, are explicit in imposing against the government the sanction of striking of testimony for failure to disclose a writing producible under Rule 612, they do not preclude the use of such a sanction when the defense fails to comply with the Rule. Indeed, the Rule requires the court to "make any order justice requires" (Rule 612, Fed. R. Evid.), and the Advisory Committee refers to Rule 16(g), Fed. R. Crim. P.— which includes the preclusion sanction—as a source "for appropriate sanctions." Advisory Committee Note to Rule 612, Fed. R. Evid., 56 F.R.D. 278. We submit that the presence in the federal rules of such a sanction strongly suggests that the preclusion order entered by the trial judge in this case did not unconstitutionally impair respondent's Sixth Amendment right to compulsory process.[9]

As for respondent's argument that he was denied the right effectively to cross-examine the government witnesses because he could not complete the impeachment by placing the investigator on the stand, we can only suggest—as we have before[10]—that to accept this argument would be to permit the defense fully to exploit the devices of cross-examination and impeachment by prior inconsistent statements while at

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[9] Respondent should find no comfort in the fact that this Court has not yet decided the validity of such a sanction in the context of the alibi notice rules. See *Wardius* v. *Oregon*, 412 U.S. 470, 472, n. 4; *Williams* v. *Florida*, 399 U.S. 78, 83, n. 14. If any inference can be drawn, it is that the Court would not at once sustain a rule requiring certain procedures while simultaneously deciding not to afford trial courts any meaningful sanctions for enforcing the rule.

[10] Brief for the United States, pp. 22–27.

the same time depriving the prosecution of the effective use of the same tool by denying it the opportunity to impeach defense witnesses. Adoption of such a position would defeat the ends of justice by allowing a partial presentation of the facts and thereby impeding the ascertainment of the truth.

Finally, there is no merit whatsoever to respondent's contention that preclusion was inappropriate because he declined to produce relevant portions of the investgator's report in "a good faith belief" that his refusal was legally sound. As this Court has so recently said, "[A]ll orders and judgments of courts must be complied with promptly," even if one believes the order to be incorrect. *Maness* v. *Meyers*, No. 73–689, decided January 15, 1975, slip op., pp. 9–10. While in some cases one can comply with the order but preserve his point for appeal, or seek a stay of the order for the purpose of pursuing an appeal, or refuse to comply with the order and face contempt (*id.* at 10–14), it is ludicrous to suggest that, because the non-compliance is in good faith, the trial judge is without power to impose a sanction and must proceed with the trial as if there had been no violation of his ruling.

Respectfully submitted.

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